(3)

NO. 89-7743

In the
Supreme Court of the United States

OCTOBER TERM, 1990

THADDEUS DONALD EDMONSON
Petitioner

versus

LEESVILLE CONCRETE COMPANY, INC.
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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July 11, 1990

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QUESTION PRESENTED

Whether the rule of *Batson v. Kentucky*, 476 U.S. 79 (1986) governing the exercise of peremptory challenges by prosecutors in criminal cases should be extended to non-governmental litigants in civil jury trials?

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Defendant-Respondent

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ARGUMENT

In urging this Court to extend *Batson v. Kentucky*, 476 U.S. 79 (1986) to civil jury trials, the petitioner begins with two incorrect factual assertions. First, he states: "No one has seriously contended in this litigation that Edmonson failed to meet the primary burden of proof espoused in *Batson*." Petition at 7. Second, he asserts: "The fact is, Edmonson's race was the determinative factor in Defendant excluding the two black jurors." *Id.* Both statements are clearly erroneous. Rather, the trial judge not only rejected plaintiff-petitioner's claim that *Batson* applies to civil jury trials, but also held no discrimination was involved in the exercise of the peremptory challenges. *Transcript*, vol. 3, p. 61. The judge never reached the issue of the defendant explaining his peremptories. It is absolutely false to assert that two of the three jurors struck by the defendant were due to race because the judge did not allow defendant-respondents, *who were prepared to do so*, to explain why two of the three venire persons struck by its peremptories happened to be black. The record simply does not support the plaintiff-petitioner's factual assertions. The issue has been and continues to be purely a legal one: Does *Batson v. Kentucky* apply to non-governmental litigants in civil jury trials?

I.

The respondent acknowledges what at least appears to be a direct conflict among the circuits on the issue presented by this case. Admittedly, the existence of such a "square and irreconcilable conflict [among the federal circuits] *ordinarily* should be enough to secure review." Stern, Gressman, and Shapiro, *Supreme Court Practice* 197 (6th ed., 1986) (emphasis in original). Nevertheless, in a number of situations presenting direct conflicts, this Court has

declined review. *Id.* For the reasons related below, respondent respectfully submits that this Court should decline review in this case.

Since *Batson v. Kentucky* ruled that ". . . the State's privilege to strike individual jurors through peremptory challenges[ ] is subject to the commands of the Equal Protection Clause," 476 U.S. at 89 (footnote omitted), three courts of appeal have ruled on the issue of whether *Batson* applies to civil litigants. In *Fludd v. Dykes*, 863 F.2d. 822 (11th Cir. 1989) *cert. denied*, 110 S.Ct. 201 (1989), a panel of the Eleventh Circuit held that "the policies underlying the Supreme Court's decision in *Batson* are equally applicable in the civil context." *Id.* at 828. In *Reynolds v. City of Little Rock*, 893 F.2d 1004 (8th Cir. 1990), a panel of the Eighth Circuit held that *Batson* applies to "governmental actors, without distinguishing criminal and civil legal proceedings." *Id.* at 1008 (footnote omitted). In the instant case, the Fifth Circuit sitting *en banc* ignored these two prior circuit court decisions and declined to extend *Batson* "into the civil area, where the considerations on which *Batson* is based are, if present at all, far weaker than in the criminal field." 895 F.2d. at 226.

Despite this apparent conflict, certain facts differentiate this case from the other two. Specifically, this case is the only one that involves the application of *Batson* against a party that truly is a private litigant. Both *Fludd* and *Reynolds* were civil rights cases under 42 U.S.C. § 1983 brought by black plaintiffs against law enforcement officials. *Reynolds* reflected this fact by confining its holding to "government actors." Although *Fludd* did not limit its holding in this way, it could well have done so. In the instant case, the Fifth Circuit avoided ruling on the application of *Batson* to civil rights cases and other civil cases involving state officials. The Court noted it had "no occasion

to consider the situation presented where the state appears as a civil litigant." 895 F.2d at 222, n. 10. The conflict, therefore, between the instant case and *Reynolds* is not as direct as might first appear. Thus, despite *Reynolds*, the Eighth Circuit in a future case could follow *Edmonson* in non-civil rights cases and the Fifth Circuit in civil rights cases could follow *Reynolds*. As to the conflict between the present case and *Fludd*, it is an unnecessary one. Given its facts, the Eleventh Circuit could well have limited its holding to "governmental actors."

The differences between the instant case and the two civil rights cases are significant on the issue of state action. Respondent submits that confusion about the relationship between the state-action doctrine and *Batson* suggests that the issue presented in this case is not ripe for decision by this Court. In *Batson*, this Court did not need to discuss state action because it was self-evident in criminal prosecution by the state. If this Court had discussed whether the rule it was announcing applied as well to defense counsel in criminal cases, then necessarily the case would have indicated something about the application of the state-action concept to other litigants and the trial court itself. In fact, *Batson* specifically left that very issue unanswered. ("We express no views on whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel." 476 U.S. at 89, n. 12). Of course, if this Court had decided whether defense counsel in a criminal case is a state actor, that decision would have offered a better indication of how the state-action issue in the case should be decided.

Without guidance from this Court, the Courts of Appeal in the three cases that have addressed *Batson's* applicability to civil trials have had to draw uncertain conclusions about the state-action doctrine. *Reynolds* found the

presence of a "governmental actor" sufficient to constitute state action, but declined to decide "whether the action of the court alone, in a case involving no governmental litigants, can supply the necessary element of governmental action." 893 F.2d at 1008, n. 2. On the sufficiency of court involvement to constitute state action, the instant case reached a different conclusion from *Fludd*. Whereas *Fludd* found the trial judge's oversight of the peremptory process sufficient to make him or her a "discriminatory state actor under the equal protection clause," 863 F.2d at 828, the Fifth Circuit opinion in this case did not so conclude.

Before answering whether a trial court's involvement in the peremptory process constitutes state action, this Court should first decide whether the exercise by a criminal defense attorney of peremptory challenges constitutes state action. The answer to that question logically precedes the issue of *Batson's* application to private litigants in civil cases. For if the Court intends to use the Equal Protection Clause to reach defense challenges, it must confront and overrule or at least distinguish *Polk Co. v. Dodson*, 454 U.S. 312 (1981), and hold criminal defense attorneys to be state actors. If this Court were to do so, then the issue as to private attorneys in civil cases would be somewhat clarified. If *Batson*, however, is not applicable to criminal defense attorneys, then there would be no doubt about the correctness of the Fifth Circuit decision in this case. We suggest the fact that this Court had the opportunity in *Alabama v. Cox*, Sup. Ct. No. 88-630 *cert. denied*, 109 S.Ct. 817 (1989)[1] to decide this very issue but

1. In *Alabama v. Cox*, Sup. Ct. No. 88-630, the prosecution had unsuccessfully petitioned the Alabama Court of Criminal Appeals for a mandamus to a trial judge in order to prevent a white defendant accused of killing a black from exercising his peremptories to exclude blacks

did not, indicates the issue in this case is even less ripe for decision.

II.

In addition to the fact that the conflict among the circuits is not as clear as it might first appear, the correctness of the lower court's decision also suggests that the instant case is not appropriate for review by this Court. The opinion speaks well for itself in this regard. The respondent therefore focuses on this Court's decision in *Holland v. Illinois*, ___ U.S. ___, 110 S.Ct. 803 (1990), which provides additional authority for the correctness of the Fifth Circuit opinion in this case.

Holland held (1) that a white defendant in a criminal case has standing to raise a Sixth Amendment claim about exclusion of black veniremen by peremptory challenge but also held (2) that defendant was not entitled under the Sixth Amendment to a cross-section of the community in the petit jury. This Court specifically did *not* decide a related issue, namely, whether a white defendant has standing under the Equal Protection Clause to raise the claim that the state excluded black veniremen. The undecided standing issue, when addressed, will again raise the related issue of whether the petit jury is subject to the "fair-cross-section requirement." In *Holland*, this Court rejected a "fair-cross-section requirement" for the petit jury under the Sixth Amendment because a contrary decision would have meant elimination of peremptory challenges. If, however, the "fair-cross-section" standard were to be applied to the petit jury under the Equal Protection Clause, the same result rejected in *Holland* would nevertheless

(footnote 1 continued)
from the jury on the basis of race. 57 U.S.L.W. 3398.

come to pass. Presumably, a majority of this Court has concluded that the Constitution does not require elimination of peremptories. If so, then the Equal Protection Clause should not be made to apply to defense attorneys in criminal cases nor to private litigants in civil cases. For if it is so applied, the inevitable result will be a cross-section standard applied to the petit jury under the Equal Protection Clause and the elimination of peremptories.

This Court's choice in *Batson* of the Equal Protection rationale was apparently a deliberate choice to avoid the cross-section requirement of the Sixth Amendment. Batson had argued the Sixth Amendment, not the Equal Protection Clause. As Chief Justice Burger's dissent emphasized, the Court "granted certiorari to decide whether [Batson] was tried 'in violation of constitutional provisions guaranteeing the defendant an impartial jury and a jury composed of persons representing a fair cross section of the community.' " 476 U.S. at 112 (Burger, C.J., dissenting). At oral argument, Batson "expressly declined to raise" the Equal Protection claim. *Id.* (See excerpt from transcript. *Id.* at 113-15.) In choosing to rest the decision on a ground not argued, as Chief Justice Burger's dissent observed, "the Court depart[ed] dramatically from its normal procedure without any explanation." *Id.* at 115. This was especially peculiar because, as one commentator notes, "the Sixth Amendment approach seems more consistent with the rationale of *Batson*, which turned on the effects of exclusion on those jurors being removed, rather than the effects of exclusion on the defendant's trial." Pizzi, "*Batson v. Kentucky:* Curing the Disease but Killing the Patient," 1987 *Sup. Ct. Rev.* 97, at 117 (hereinafter Pizzi).

Had *Batson* been decided on Sixth Amendment grounds, the case most assuredly would have been applicable also to defense counsel in a criminal case. The

Sixth Amendment involves no "state action" hurdle. As the Fifth Circuit observed in "*United States v. Leslie*, 783 F.2d 541, 565 (5th Cir. 1986), *vacated*, 107 S.Ct. 1267 (1987), "every jurisdiction which has spoken to the matter, and prohibited prosecution case-specific peremptory challenges on the basis of cognizable group affiliation, has held that the defense must likewise be prohibited." Inevitably, as pointed out in *Holland*, a decision that the petit jury is subject to the fair cross-section requirement would mean judicial regulation of the racial mix in the jury. Under the Sixth Amendment cases the party claiming a violation of the amendment need not be of the same race as the excluded juror. *Duren v. Missouri*, 439 U.S. 357, 359, n. 1 (1979); *Taylor v. Louisiana*, 419 U.S. 522, 526-31 (1975); *Peters v. Kiff*, 407 U.S. 493 (1972). *Holland v. Illinois*, *supra*. This is consistent with the Sixth Amendment's cross-section standard, which has evolved into a requirement for the jury venire to reflect a near mirror-imaging of the racial composition in the community from which the potential jurors are drawn. Extension of this mirror-imaging to the petit jury has thus far been prevented, at least under the Sixth Amendment, by the second holding in *Holland*.

This Court has repeatedly rejected this idea of the petit jury mirroring the racial composition of the community. Five days after avoiding the Sixth Amendment issue in *Batson*, *Lockhart v. McCree*, 476 U.S. 162 (1986), held that the Constitution does not prohibit states from "death qualifying" juries in capital cases. The Court distinguished between the jury venire, to which the cross-section standard applies, and the petit jury, which is not subject to the cross-section standard:

> We have never invoked the fair-cross-section principle to invalidate the use of either for-cause or

peremptory challenges to prospective jurors, or to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large. See *Duren v. Missouri*, 439 U.S. 357, 363-364, 99 S.Ct. 664, 668, 58 L.Ed.2d 579 (1979); *Taylor v. Louisiana*, 419 U.S. 522, 538, 95 S.Ct. 692, 701-02, 42 L.Ed. 2d 690 (1975). ("[W]e impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population"); *cf. Batson v. Kentucky*, ___ U.S. ___, ___, n. 4, 106 S.Ct. 1712, 1716, n. 4, 89 L.Ed.2d ___ (1986) (expressly declining to address "fair-cross-section" challenge to discriminatory use of peremptory challenges). The limited scope of the fair-cross-section requirement is a direct and inevitable consequence of the practical impossibility of providing each criminal defendant with a truly "representative" petit jury. . .

476 U.S. at 173-74 (footnote omitted.)

This quotation, which was repeated in *Holland*, points up the tension within *Batson*. *Batson* reaffirms that petit juries are not required to approach a mirror-image of the community (". . . we have never held that the Sixth Amendment requires that 'petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population,' " 476 U.S. at 85, n. 6.) Yet some of *Batson's* language, taken to logical extremes, would produce just that result. By relying on the Equal Protection Clause and the requirement of purposeful discrimination, *Batson* apparently attempts to avoid such a consequence. One commentator has observed that "[t]he Court's decision to steer clear of the Sixth Amendment and the fair cross-section theory was no doubt heavily influenced by the fact that, at the time *Batson* was under consideration, it was wrestling with *Lockhart v. McCree*, 106

S.Ct. 1758 (1986) . . ." Pizzi at 121. *Holland* has reaffirmed this view expressed in *Lockhart* and, by implication, the limited scope of *Batson*.

III.

The issue presented in this case is an important one, but before it is ripe for ultimate decision by this Court, other issues remain to be decided. The key preliminary issue is the application of *Batson* to defense attorneys in criminal cases. Resolution of that issue will shape the state-action doctrine in regard to the peremptory process. Addressing that issue will also allow this Court to consider whether it wishes to do indirectly what it has declined to do directly, namely, to apply the cross-section requirements of the Sixth Amendment through the Equal Protection Clause to the petit jury. In the meantime, no harm is done by declining review in this case because the Court of Appeals for the Fifth Circuit, *en banc*, decided this case correctly.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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